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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 357 51

STELLA BARBER,

Petitioner,

vs.

B. GEORGE BARBER.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE AND BRIEF IN
SUPPORT THEREOF.**

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J. Y. JORDAN, JR.,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 857.

STELLA BARBER,

vs.

Petitioner,

B. GEORGE BARBER.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE.**

*To the Honorable Harlan F. Stone, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

Your petitioner respectfully shows:

I.

The question for determination is, whether the money judgment from the Superior Court of Buncombe County, North Carolina, sought to be enforced, is a final judgment, entitled to full faith and credit by virtue of the provisions of Article IV, Section 1 of the Constitution of the United States.

The Chancery Court of Hamilton County, Tennessee, held that it was a final judgment (R. 11), and rendered judgment for petitioner in the sum of \$20,866.62 (R. 13). The Supreme Court of Tennessee, the highest Court of the State, held it was not a final judgment, and dismissed the case (R. 22-24; 25).

The decision of the Supreme Court of Tennessee was in conflict with Article IV, Section 1, of the Federal Constitution, was in violation of Code Section 687, 28th U. S. C. A., and was not in accord with applicable decisions of this Court, to-wit: *Sistaire v. Sistaire*, 218 U. S. 1, 54 L. Ed., 905; *Barber v. Barber*, 21st Howard, 582.

II.

Summary Statement of the Matters Involved.

This suit was commenced in the Chancery Court of Hamilton County, Tennessee, to enforce a money judgment of a Superior Court of Buncombe County, North Carolina, in the amount of \$19,707.20 (R. 1).

Defendant answered, and alleged (paragraphs 11 and 12, R. 8, 9) that the judgment was not final, and not entitled to full faith and credit under Article IV, Section 1, of the Federal Constitution; that the judgment was for separate maintenance or alimony, without divorce; was rendered under authority of Section 1667 of the Consolidated Statutes, Supplement 1924, of North Carolina, which, among other things, provides:

"The order of allowance herein provided for may be modified or vacated at any time on application of either party, or of any one interested";

that the discretionary right of the Court to modify or vacate the judgment prevented petitioner (complainant) from acquiring any vested or absolute right to receive installments.

of support, past due, or future; and that the judgment of the Court for consolidated amounts of matured installments of alimony into one judgment did not make the lump sum judgment final (R. 8, 9).

The certified copy of the judgment sued on (R. 2) and a Stipulation (R. 10) constituted the entire proof. The Stipulation (R. 10), by reference, made the records of appeal, and Opinions of the Supreme Court of North Carolina in the two cases, styled, *Barber v. Barber*, 216 N. C., 232, 4th S. E. (2d), 447, and 217 N. C., 422, 8th S. E. (2d), 204, admissible evidence to prove or tend to prove the North Carolina law.

The Opinion in the case of *Barber v. Barber*, 217 North Carolina, 422, 8th S. E. (2d), 204, shows that petitioner sued defendant in the Superior Court of Buncombe County, North Carolina, for separate maintenance and alimony; that she was awarded alimony, payable in monthly installments; that defendant defaulted in payment; that, by motion or petition in the case, a judgment in the aggregate of all past due installments was prayed; that judgment was awarded in the sum of \$19,707.20, and that the award of the Trial Court was authorized by the Supreme Court of North Carolina.

The Chancellor, in his Opinion, held that the judgment was final (R. 11), and rendered judgment for \$20,866.62 by decree enrolled June 26, 1941 (R. 13).

June 26, 1943, defendant, by petition for Writ of Error, took the case to the Supreme Court of Tennessee, the highest Court of the State, for a review of said judgment (R. 14-19). He contended: "The foreign judgment upon which this suit is based was not a 'final' decree, and accordingly is not entitled to full faith and credit by this Court under Article IV, Section 1 of the Constitution of the United States for the reason that said judgment for separate maintenance, without divorce was rendered under the authority of Section

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1667 of the Code of North Carolina which reserved to the Court which rendered the judgment the right to modify or vacate it at any time, even as to past due and unpaid installments. This discretionary right of the Court to modify the judgment prevented complainant from acquiring any vested or absolute right to receive the full judgment from your petitioner, and cannot be a final judgment such as the law requires this Court to give full faith and credit." (R. 18.)

Section 1667, quoted on page 2 hereof.

Defendant assigned as the only material error the action of the Lower Court in holding that the consolidation of amounts due under an award of separate maintenance, without divorce, constituted a final judgment, entitled to full faith and credit under the Constitution of the United States (R. 20, 21).

In a written Opinion (R. 22), published in Southwestern Reporter Advance Sheets of December 28, 1943, page 324 (175 S. W. (2d), 324), the Supreme Court of Tennessee reversed the Lower Court, saying, in substance, that the language of the North Carolina Court seems to stamp the judgment sued on as belonging to that class held not to be final by the Supreme Court of the United States in *Sistaire v. Sistaire*, 218 U. S., 1, 54 L. Ed., 904, and, therefore, not entitled to the protection of the full faith and credit clause of the Constitution of the United States. The decree of Supreme Court of Tennessee reversing the lower court was entered November 20, 1943 (R. 25).

On December 8, 1943, petitioner (complainant) seasonably filed a petition to rehear (R. 25), and insisted:

• *First:* The Court apparently overlooked the fact that the judgment sued on was rendered on application of petitioner for final judgment on accrued installments

of alimony for purpose of enforcement. Defendant had opportunity, but did not apply for modification.

Second: The Court misconstrued the Opinion of the North Carolina Court as holding that the judgment sued on was not final, but belonged to that class of judgments subject to modification in the discretion of the Court.

R. 26.

January 8, 1944, an Order was pronounced and entered overruling the petition to re-hear (R. 32).

Your petitioner presents to this Court, and files herewith, a duly certified transcript of the entire record in the case as the same appears in the Supreme Court of the State of Tennessee.

The principal questions involved on said appeal may be summarized as follows:

1. Was the judgment sued on from the Superior Court of Buncombe County, North Carolina, for the aggregate of past due installments of the alimony formerly ordered by the Court, a final judgment, entitled to full faith and credit under Article IV, Section 1, of the Constitution?

2. Were the installments of support under a prior Order of the Superior Court of North Carolina final judgments, entitled to full faith and credit under the Constitution?

3. Was the right to receive the alimony, by reason of Section 1667, Consolidated Statutes of North Carolina, quoted above, so discretionary with the Court rendering the decree that, even in the absence of application to modify the decree, no vested right exists?

These questions were decided by the Supreme Court of Tennessee in favor of the defendant, and not in accord with the applicable decisions:

Sistaire v. Sistaire, 218 U. S., 1, 54 L. Ed., 905;

Barber v. Barber, 21 Howard, 582;

Magnolia Petroleum Co. v. Hunt, 64 Sup. Ct. Rep., 208.

III.

Reasons Relied On for Allowance of the Writ.

1st. *In conflict with Article IV, Section 1 of the Federal Constitution, and Section 687, 28th U. S. C. A.*

The decision of the Supreme Court of Tennessee violates Article IV, Section 1, of the Constitution of the United States, and Section 687 of 28th U. S. C. A., in that it deprives petitioner of her constitutional rights, denies the enforcement of her judgment, and relieves the debtor from his just obligation.

2nd. *Conflicts with the applicable decisions of this Court.*

This Court, in two cases, *Sistaire v. Sistaire* and *Barber v. Barber*, cited above, has held similar judgments to be protected by said clause of the Constitution.

3rd. Petitioner is seeking enforcement of her rights under the Constitution of the United States, and asks a review of this constitutional question.

4th. *Error in decree of State Court.*

Upon both reason and authority, the decree of the State Court is erroneous, and, if allowed to stand, will amount to a denial of her rights, discharge of the defendant from liability, and leave this petitioner without a remedy.

Petitioner annexes hereto her brief in support of this petition, in which she cites, and relies on, applicable decisions of this Court, and the decisions of other Courts, under which she verily believes she is entitled to the relief here sought.

WHEREFORE, your petitioner respectfully prays that writ of certiorari be granted to review the decree of the Supreme Court of Tennessee, entered November 20, 1943, and made

final by decree overruling the petition to re-hear January 8, 1944, in the case of *Stella Barber v. B. George Barber*, and that said decree may be reversed by this Honorable Court and judgment entered in her behalf for the amount of the judgment sued on, with interest; and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem meet and just.

And your petitioner will ever pray.

STELLA BARBER,

By C. W. K. MEACHAM,

Counsel for Petitioner.

J. Y. JORDAN, JR.,

ELLIS K. MEACHAM,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 857

STELLA BARBER,

vs.

B. GEORGE BARBER,

Petitioner,

Defendant.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinions in the Court Below.

The Opinion of the Supreme Court of Tennessee (R. 22) was rendered November 20, 1943, and has now been reported only in Southwestern Reporter Advance Sheets published December 28, 1943; 175 Southwestern (2d), 324.

The decree denying petition to rehear (R. 32) was rendered January 8, 1944.

The Opinion of the Chancellor (R. 11, 12) was rendered July 19, 1941.

II.

Jurisdiction.

1. The date of the decree to be reviewed is November 20, 1943 (R. 25). Order overruling petition to rehear was rendered January 8, 1944 (R. 32).

2. The constitutional provision, which is believed to protect the judgment and sustain the jurisdiction of this Court, is Article IV, Section 1, of the Federal Constitution:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of any other state."

The statutory provision, which is believed to sustain the jurisdiction of the Court, is Section 687, 28th U. S. C. A.

3. The judgment sued on, as shown by the Opinion of the Supreme Court of North Carolina, was a money judgment in the Superior Court of Buncombe County, North Carolina, and represents the aggregate amount of past due monthly installments of alimony awarded by a former Order of the Superior Court in a proceeding between these parties.

4. The cases believed to sustain said jurisdiction are:

Sistaire v. Sistaire, 218 S. W., 11, 54 L. Ed., 905;

Barber v. Barber, 21st Howard, 582;

Magnolia Petroleum Co. v. Hunt, 64 Sup. Ct. Rep., 208;

Barber v. Barber, 217 N. C., 422, 8th S. E. (2d), 204.

III.

Statement of the Case.

A full statement of the case has been given in section II of the foregoing petition, pages 2-6, which is hereto attached, and made a part of this brief.

IV.

Specification of Errors.

I. The State Supreme Court erred in holding and decreeing that the money judgment from the Superior Court

of North Carolina sued on was not a final judgment, entitled to full faith and credit by virtue of Article IV, Section 1, of the Federal Constitution; and in reversing and dismissing the case.

2. The State Supreme Court erred in holding that under the North Carolina law the judgment sued on belonged to that class held not to be final judgments by this Court in *Sistaire v. Sistaire*, 218 U. S., 1, 54 L. ed., 905, and, therefore, not entitled to the protection of the full faith and credit clause of the Constitution:

Opinion, R. 22-24.

3. The State Supreme Court erred in holding that the right to receive the alimony awarded was so discretionary with the Court rendering the judgment that, even in the absence of application to modify the judgment, no vested right existed.

V.

Summary of Argument.

CONFLICT OF APPLICABLE DECISIONS OF THIS COURT.

It is settled by the decisions of this Court that the money judgment sued on is protected by the Federal Constitution.

Sistaire v. Sistaire, 218 S. W., 1, 54 L. ed. 905;

Barber v. Barber, 217 N. C., 422, 8 S. E. (2d), 204;

Magnolia Petroleum Co. v. Hunt, 64 Sup. Ct. Rep., 208.

The decision of the Supreme Court of North Carolina, holding that the Superior Court had the right to render the judgment sued on, in effect pronounced it a final judgment by awarding execution, and remedies for its enforcement.

Section 1667 of the Consolidated Statutes of North Carolina, Supplement 1924, does not deprive petitioner of the

right to judgment for past due installments of alimony, and does not vest the Superior Court with discretion or power to modify or vacate past due installments of alimony. No application for modification was made by defendant, and no modification has been made.

VI.

ARGUMENT.

The money judgment sued on belongs to that class of judgments which this Court, in *Sistaire v. Sistaire*, 218 U. S. 1, 54 L. ed., 905, and in *Barber v. Barber*, 21 How., 582, held were final judgments, entitled to full faith and credit under the Federal Constitution. The Opinion of the Supreme Court of North Carolina, in the case of *Barber v. Barber*, 217 N. C., 422 8 S. E. (2d), 204, shows that petitioner was awarded separate maintenance by the Superior Court of Buncombe County, North Carolina, payable in monthly installments, and that defendant defaulted in payments. These monthly installments were judgments of record, entitled, until changed, to full faith and credit under the Constitution. After maturity, they were not subject to modification. Such was the holding in the case of *Sistaire v. Sistaire*, *supra*, page 13, as follows:

"And, again, determining the effect of a decree for future alimony, the court expressly declared (p. 9): 'Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' And it is, we think, clear from the context of the opinion that the court held that the decree in favor of Mrs. Barber operated to cause an indebtedness to arise in her favor as each installment of alimony fell due and that a power to modify, if exerted, could only operate prospectively."

The original bill (R. 1), and Exhibit "A" (R. 2), show that petitioner obtained a judgment in the same Superior

Court of Buncombe County, North Carolina, in the same case against defendant, for \$19,707.20. Said judgment awards execution for its enforcement (R. 2). Certainly said judgment for an aggregate of all past due installments was final, and protected by the Constitution of the United States. That is made certain by the language of this Court in the case of *Sistaire v. Sistaire*, *supra*, pages 16 and 17, where, stating that the case of *Lynde v. Lynde*, 181 U. S. 187, did not overrule the *Barber* case, said:

"First, that, generally speaking, where decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber* case, 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where by the law of the state in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the Court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even though no application to annul or modify the decree in respect to alimony has been made prior to the installments becoming due."

It is thus clear that no right to modify the allowance for alimony upon the application of the husband existed with respect to the wife's rights in installments which were overdue.

No Absolute Discretion in Superior Court.

It appears that past due installments of a judgment for alimony rendered in one State are within the protection of

the full faith and credit clause of the Constitution, unless the right to receive the alimony is so discretionary with the Court rendering the decree, that, even in the absence of application to modify the decree, no vested right attaches.

Section 1667 of the Consolidated Statutes, Supplement 1924 of North Carolina, does not provide the Court rendering the installment judgment such discretionary power. That statute providing, "The order of allowance herein provided for may be forfeited or vacated at any time on the application of either party, or of any one interested", does not vest the Court with full discretion in the absence of an application to modify the judgment, but only grants power to modify future installments upon the application of parties. Clearly then, under the holding in the case of *Sistaire v. Sistaire*, it does not, and cannot be construed to affect past due installments of alimony.

The Supreme Court of Tennessee Erred.

If petitioner is correct in the statement above, the Supreme Court of Tennessee was in error in concluding as follows:

"The foregoing language of the North Carolina Court seems to stamp the judgment sued on as belonging to that class held not to be final by the Supreme Court in *Sistaire v. Sistaire*, and therefore not entitled to the protection of the full faith and credit clause of the Constitution of the United States."

Record 22-24.

Perhaps the Supreme Court of Tennessee were more likely misled by the language of the Supreme Court of North Carolina in the case of *Barber v. Barber*, 217 N. C. 422, 8th S. E. (2d) 205, wherein it said:

"This Court has held that the allowance of alimony is higher than the 'straight contractual obligation'.

It is a claim that the Homestead Exemption cannot be called on to defeat; the failure to pay is the breach of an implied contract and attachment will lie; the Court may declare it a lien on the husband's property; the property, both real and personal, can be held and appropriated to pay it. The motion in the cause can be dealt with only as a petition for the ascertainment of the alimony due the plaintiff under former orders of the Court, looking toward enforcement against the defendant by appropriate proceeding. It is not a final judgment in the action, since both the plaintiff and the defendant may apply for other orders and for modifications of orders already made, which the Court will allow as the ends of justice require, according to the changed conditions of the parties. The orders made from time to time are, of course, res judicata between the parties, subject to this power of the Court to modify them. The consolidation of the amounts due, when ascertained in one order or decree does not invest any of these orders with any other character than that which they originally had. If the defendant is in court only by reason of the original service of summons, he is in court only for such orders as, upon motion, are appropriate and customary in the proceeding thus instituted. There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—any more than an ordinary one. The Court below, in its sound discretion, which is not ordinarily reviewable by this Court, under the motion of plaintiff in this cause can hear the facts, change of conditions of the parties, the present needs of support of any of the children and, in its sound discretion, render judgment for what defendant owes under the former judgment and failed to pay and see to it that such judgment is given to protect plaintiff, and give diligence to make her (your) calling and election sure."

The foregoing quotation may afford some basis for the erroneous conclusion reached by the Tennessee Supreme Court. However, when properly interpreted, it does not

seem possible that the Supreme Court of North Carolina intended its language to have any such construction. The North Carolina Court said, "The defendant, therefore, cannot escape the performance of his duty to support the plaintiff on the ground that he sustains toward her the relation of a mere debtor." That "a judgment awarding alimony is a judgment directing the payment of money by a defendant to plaintiff, and, by such judgment, the defendant thereupon becomes indebted to the plaintiff for such alimony as it becomes due, and when the defendant is in arrears in the payment of alimony the Court may, on application of plaintiff, judicially determine the amount then due, and enter its decree accordingly. The defendant, being a party to the action and being given due notice of the motion, is bound by such decree, and the plaintiff is entitled to all the remedies provided by law for the enforcement thereof. *Vaughan v. Vaughan*, 211 N. C. 354, 190 S. E. 492."

Barber v. Barber, 217 N. C. 422, 81 S. E. (2d) 205.

The North Carolina Supreme Court thus designates the judgment as a debt, of higher than contractual obligation, which the defendant cannot escape, and gives a complete remedy for its enforcement. The judgment sued on, within its terms, awards execution (R. 2). It would, therefore, seem that having vested the judgment with all the elements of finality the North Carolina Court did not mean to deny its finality. What else could the Court do to make a judgment final? How else could petitioner obtain a final judgment? The language of the Court was wholly inconsistent with any meaning or construction other than finality. To hold that judgment not final renders the judgment purposeless and valueless; and, in effect, finds that the Courts of North Carolina were doing a vain thing.

If, however, it did deny finality, its holding was in conflict with the full faith and credit clause of the Constitu-

tion, and not in accord with the holdings in *Sistaire v. Sistaire* and *Barber v. Barber*, cited *supra*, and also with the recent case of *Magnolia Petroleum Company v. Hunt*, 64 Sup. Ct. Rep., page 216, which says:

"The decision of the State Court is not supported by the suggestion that the Texas award is not res judicata in Louisiana because respondent's suit there was on a different cause of action. When a State Court refuses credit to the judgment of a sister State because of its opinion of the nature of the cause of action, or the judgment in which it is merged, an asserted Federal right is denied and the sufficiency of the grounds of denial are for this Court to decide."

Also, in that case on page 213, applying the Constitution to money judgments, this Court says:

"We are aware of no such exception in the case of a money judgment rendered in a civil suit. Nor are we aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the State of its rendition. *Milwaukee County v. M. E. White Company*, *supra*, 296 U. S., at pages 277, 278, 56 S. Ct. at page 234, L. Ed. 220."

It thus seems conclusive that the Supreme Court of Tennessee was in error in denying the protection of Article IV, Section 1, of the Constitution to the judgment sued on, and denying petitioner (complainant) her rights and remedies under the Constitution.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the issuance of a writ of certiorari, and the exercise by this Court of its supervisory powers, in order that the decree of the Supreme Court of the State of Ten-

nessee, entered November 20, 1943, and made final by denial of petition to rehear January 8, 1944, reversing the decree of the Chancery Court of Hamilton County, Tennessee, in the case styled *Stella Barber v. B. George Barber*, may be reversed, and the decree of the lower Court reinstated, with all rights and remedies for enforcement.

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